



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (T&E-2007-01)
STANDING TO BRING ELDER ABUSE ACTION AFTER
DEATH OF ABUSED ELDER OR DEPENDENT ADULT

To: State Bar Office of Governmental Affairs

From: Tracy Potts, Chair, Executive Committee, Trust and Estates Section, State Bar of CA
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Re: Amendment to Welfare and Institutions Code §15657.3
Re: Standing to Bring Elder Abuse Action After Death of Abused Elder or Dependent Adult
Project No. 2006-01

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Digest:

Welfare and Institutions Code §15657.3 sets forth who has standing to bring an elder abuse lawsuit under the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) after the death of an elder or dependent adult. That provision provides in pertinent part:

§ 15657.3

(d) Upon petition, after the death of the elder or dependent adult, the right to maintain an action shall be transferred to the personal representative of the decedent, or if none, to the person or persons entitled to succeed to the decedent's estate.

Unfortunately, while empowering personal representatives or, alternatively, the decedent's successors, the Legislature did not anticipate that in many cases the abuser has named himself or herself the personal representative of the estate by unduly influencing the elder or dependent adult to change his or her estate planning documents. Thus, the very persons the statute was designed to guard against are the ones who have the power to decide whether to bring an elder abuse lawsuit.

The proposed legislation would amend §15657.3 to give a decedent's successor in interest or the persons who would be the decedent's heirs under the laws of intestate succession standing to prosecute or continue a elder abuse lawsuit if there is no personal representative or the personal representative fails to commence or maintain an elder abuse action within 90 days of the decedent's death. The court, on a showing of good cause, may allow such an action to be brought earlier than 90 days or the court may substitute the personal representative as the plaintiff in the elder abuse action. The amendment will conform EADACPA to current statutory and common law giving the personal representative standing unless special circumstances can be pled by beneficiaries of the decedent's estate showing why the personal representative is not the proper party to bring an elder abuse action in the decedent's name.

History and Purpose:

In 1991, by the enactment of SB 679 and the addition of Welfare & Institutions Code §15657, et seq., the Legislature recognized that elders and dependent adults are a disadvantaged class and are at the greatest risk for abuse, neglect, or abandonment by their families or caretakers. In an effort to supplement criminal prosecution, the Legislature renamed the Elder Abuse Act as the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) and added civil remedy provisions to provide incentives for civil enforcement of elder abuse cases.

The stated purpose of EADACPA is to enable interested persons to retain attorneys to take up the cause of abused elderly persons and dependent adults.¹ Specifically, Welfare & Institutions Code §15657.3 gives standing to "the personal representative of the decedent, or if none, to the person or persons entitled to succeed to the decedent's estate" to bring an elder abuse action by incorporating provisions similar to CCP §377.30.²

¹ Welfare & Institutions Code §15600(j) provides: "It is the further intent of the Legislature in adding Article 8.5 (commencing with Section 15657) to this chapter to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults."

² CCP §377.30 provides: "A cause of action that survives the death of the person entitled to commence such action or proceeding passes to the decedent's successor in interest...and an action may be commenced by the decedent's personal representative, or if none, by the decedent's successor in interest." CCP §377.11 defines a "decedent's successor in interest" as the beneficiary of decedent's estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action.

Incorporating provisions similar to CCP §377.30, however, does not achieve the stated purpose of enabling interested persons to bring or continue elder abuse lawsuits, particularly in situations where the defendant in the action is the personal representative.

The issue of standing to sue a personal representative was raised in *Estate of Laura Marie Lowrie, Deceased* (2004) 118 Cal.App.4th 220, 12 Cal.Rptr.3d 828. In this case, an elder abuse lawsuit was brought by the decedent's granddaughter against one of the decedent's sons (hereafter referred to as the "defendant"), who allegedly isolated his mother, going as far as to apply duct tape his mother's telephone so that she could not call out, and influenced her to change her trust to name him as trustee and executor. The decedent's 1989 documents named the decedent the trustee and the defendant and granddaughter the successor trustees. After the mother resigned as trustee and the defendant became trustee, the defendant transferred her assets to himself prior to her death. The decedent had bequeathed plaintiff an interest in a home she had lived in with the decedent. Two other children of the decedent (including the granddaughter's mother) were given cash gifts of \$10,000 each, and the defendant was given the residue of the estate. In 1992, the decedent amended her trust and the granddaughter was given the same pecuniary gift as her mother and other uncle.

The published portion of the opinion dealt with the issue of standing. Prior to trial, the trial court rejected the defendant's argument that the granddaughter had no standing to bring an action for elder abuse because the granddaughter was not a person "entitled to succeed to the decedent's estate" under the laws of intestate succession under Probate Code §6402. Under the intestate succession statutes, only the children or the issue of a deceased child inherit a decedent's estate. In this case, the granddaughter's mother was living and was not the plaintiff in the elder abuse action. The defendant also pointed out that the granddaughter was not within the class of persons entitled to commence or continue an action that survived the decedent under CCP §377.30 or to commence a wrongful death action.³

The court concluded that standing for purposes of EADACPA must be analyzed in a manner that induces those persons whom the legislature expressly wished to empower to file elder abuse and neglect lawsuits and that abusers should not be allowed to gain control of an estate to preclude other interested persons from bringing an elder abuse suit. *Lowrie*, supra, 118 Cal.App.4th, at pp. 230-231. The court observed that if the defendant was disinherited by his acts, the granddaughter would have succeeded to his interest, not only as a fiduciary but as a beneficiary of the estate. The court relied in part on Probate Code §48, which provides that who is an "interested person" should be determined according to the particular purposes of the proceeding, and concluded that §15657.3 should be "sufficiently elastic" to fulfill the purposes of EADACPA.

³ CCP §377.60 provides that a cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by "(a) the decedent's surviving spouse, domestic partner, children, and the issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession."

The general rule, both at common law and by statute, is that the personal representative of an estate is the proper party to sue on behalf of the estate absent special circumstances. CCP §369. 5 Witkin, *California Procedure* (4th ed.) (hereafter “*Calif. Proc.*”), Pleadings §115, at p. 174; see also 12 Witkin, *Summary of California Law* (9th ed) (hereafter “*Summary*”), Wills and Probate “489-490, at pp. 508-509. Accordingly, neither one nor all of the heirs or devisees under a will can sue alone, and they are not necessary or proper parties to a lawsuit filed by the representative. Under former law, if there was no personal representative, the heirs had to institute probate proceedings to appoint one. The purpose of CCP §377.30 is to allow the decedent’s successors in interest to commence a surviving cause of action without the necessity of having to appoint a personal representative. 5 Witkin, *Calif. Proc.*, Pleading §175, at p. 175; 12 Witkin, *Summary*, Wills and Probate §493 and Supp. §§493C and 493D.

California law has long recognized an exception to the general rule that the personal representative is the proper party to an action surviving the decedent’s death. In special circumstances an heir or devisee may sue if the personal representative cannot be expected to prosecute the action himself. For example, if a personal representative is guilty of fraud or collusion with the defendant, the heirs or devisees may maintain the action themselves.⁴

The Trust and Estates Section of the State Bar of California believes that the proposed amendment to Welfare & Institutions §15657.3 would codify *Estate of Lowrie* and common law and clarify that a decedent’s successor in interest (in *Lowrie* the granddaughter was a devisee and a successor trustee) or an intestate heir (a person who would have taken had the alleged abuser had not changed the decedent’s estate plan) has standing to bring an elder abuse lawsuit if a personal representative fails or refuses to bring an elder abuse action. The amendment is not intended to abrogate the common law rule that special circumstances must be specially pled to show why the plaintiff has standing. Furthermore, it is expressly intended that persons who occupy a position substantially similar to a personal representative, such as the successor trustee of a living trust created by the decedent, should also have standing as a decedent’s successor in interest under decedent’s pour-over will.

While the amendment gives the personal representative or successor trustee time to file a petition for his or her appointment, the amendment also permits the court to allow a beneficiary to file an action earlier than 90 days if there is a showing the personal representative may abscond with funds. If the personal representative is willing to file such an action but has insufficient time to obtain his or her appointment, the amendment also allows the personal

⁴ (*Landis v. First National Bank* (1937) 20 Cal.App.2d 198, 207, 66 P.2d 730 [executor who was the president of the bank cannot be counted to prosecute an action against his bank in good faith]; see also 12 Witkin, *Summary*, Wills and Probate §493 (discussing *Landis*), at p. 512; *Olson v. Toy* (1966) 46 Cal.App.4th 818, 824 [plaintiff heirs had standing to sue for declaratory relief and to impose a constructive trust on decedent’s estate; (former) Probate Code §9654 (currently codified at §850) allowed the heirs, by themselves, or jointly with the personal representative, maintain an action for possession or property. “Defendant Toy is both decedent’s personal representative and the trustee of the trust. Toy could hardly be expected on behalf of the estate to initiate an action to declare invalid the trust which she administers as trustee.”]).

representative to request the court that he or she be substituted in as the plaintiff in the elder abuse action. The Trust and Estates Section believes that the amendment is drawn so that a person such as the plaintiff in *Estate of Lowrie* will have standing to bring an elder abuse action but the amendment is narrow enough so that persons who have no stake in such an action would not be permitted to bring an action under EADACPA.

Documentation:

The California Legislature has that declared nearly 225,000 Californians are victims of elder and dependent adult abuse every year, including neglect and physical, psychological, emotional, and financial abuse; and that victimization levels are likely to increase. [ACR 8 (Dymally), January 14, 2005]. The United States Census Bureau projects that California's elderly population will nearly double in the next 20 years, from 3.7 million to 6.4 million. See Office of the Attorney General, State of California Department of Justice, *Elder Abuse in California*. See also California Assembly Committee on Public Safety, Committee Analysis of SB 2199 (June 23, 1998). The Subcommittee on Health & Long-Term Care of the House Select Committee on Aging, 101st Congress, in its report, *Elder Abuse: A Decade of Sham and Inaction*, XI (Comm. Print 1990), estimated that more than 1.5 million persons may be victims of abuse each year. This is a marked increase of the numbers reported in a landmark 1981 report, *Elder Abuse: An Examination of a Hidden Problem*, Subcommittee on Health & Long-Term Care of the House Select Committee on Aging, 94th Congress, which reported that four percent of the American aged, roughly 1,000,000 persons, might be victims of elder abuse. The Department of Social Services concluded that only one in five cases of elder and dependent adult abuse is reported. *Elder and Dependent Adult Abuse: Analysis of SB 2199* before Senate Rules Committee, 1997-98 Sess. The California State Association of Counties (CSAC) documented that reports of abuse and neglect of adults rose more than 116% between 1984 and 1993. California Assembly on Public Safety, Committee Analysis of SB 2199. See also Nina Santo, *Breaking the Silence: Strategies for Combating Elder Abuse in California*, 31 McGeorge Law Review 801 (Spring 2000); Seymour Moskowitz *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect* 36 Loyola School of Law 589 (Winter 2003).

Pending Legislation:

No similar legislation has been introduced to date.

Pending Litigation:

None known.

Fiscal impact:

No anticipated fiscal impact. One of the purposes of EADACPA was to relieve the burden on prosecutors to bring elder abuse actions by providing for civil enforcement.

Likely support/Opposition:

The State Bar of California Trusts and Estates Section will support this legislation. There is no known opposition.

Germaneness:

The State Bar's Trusts and Estates Section deals with estate and trust litigation and litigation involving elder abuse. Section members are involved in litigation like the Lowrie matter on a regular basis. The subject matter of the legislation comes within the scope of the interests and knowledge of the Trusts and Estates Section of the State Bar of California.

TEXT OF PROPOSAL:

SECTION 1. Section 15657.3 of the Welfare and Institutions Code is amended to read:

15657.3. (a) The department of the superior court having jurisdiction over probate conservatorships shall also have concurrent jurisdiction over civil actions and proceedings involving a claim for relief arising out of the abduction, as defined in Section 15610.06, or the abuse of an elderly or dependent adult, if a conservator has been appointed for plaintiff prior to the initiation of the action for abuse.

(b) The department of the superior court having jurisdiction over probate conservatorships shall not grant relief under this article if the court determines that the matter should be determined in a civil action, but shall instead transfer the matter to the general civil calendar of the superior court. The court need not abate any proceeding for relief pursuant to this article if the court determines that the civil action was filed for the purpose of delay.

(c) The death of the elder or dependent adult does not cause the court to lose jurisdiction of any claim for relief for abuse of an elder or dependent adult.

(d) ~~Upon petition,~~ After the death of the elder or dependent adult, the right to *commence or maintain an action shall be transferred pass* to the personal representative of the decedent, ~~or if none, to the person or persons entitled to succeed to the decedent's estate.~~ *If there is no personal representative, or the personal representative fails to commence or maintain an action within 90 days of decedent's death, then any of the following may commence or maintain an action under this chapter: (1) the decedent's successor in interest as defined by CCP §377.11 or (2) any intestate heir of the decedent whose interest may be affected by the action. For good cause, the court may permit any person who has standing under this section to commence or maintain an action prior to the expiration of 90 days, or the court may substitute the personal representative as the plaintiff in the action.*